STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BERKSHIRE CONSTRUCTION SERVICES, INC.	)	
	)	
VS.	)	W.C.C. 04-03003
	)	
ADELITA S. OREFICE, in her capacity as Director of the RHODE ISLAND DEPT. OF LABOR & TRAINING	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came before the Appellate Division on the respondent's appeal from the decision and decree of the trial judge granting the petitioner's request for reimbursement from the Workers' Compensation Administrative Fund pursuant to R.I.G.L. § 28-35-20(f). After review of the record and consideration of the arguments of the parties, we deny the appeal and affirm the findings and orders of the trial judge.

The parties submitted the following stipulation of facts to the trial judge:

> "1. This matter arises on an appeal by the Employer/Insurance Carrier from a request for reimbursement from the workers' compensation administrator [sic] fund. The request for reimbursement was denied pursuant to a decision by a hearing officer for the Department of Labor and Training dated March 30, 2004. A copy of the that [sic] decision is attached to this proposed stipulation.
>
> "2. Berkshire Construction Services was the Respondent/Employer in a petition prosecuted on behalf of Robert Muggle, Jr., W.C.C. 01-6627, an original petition for workers' compensation benefits. A Pre-Trial Order entered in that matter on October 24, 2001 required the payment of benefits for partial incapacity beginning August 13, 2001 and continuing based on an average weekly wage of $742.31. The identified injury was described as "bilateral carpal tunnel syndrome." A copy of that original Pre-Trial Order is attached.

> "3. After a trial on the matter, a Trial Decree was entered on June 7, 2002. Pursuant to that Decree, it was determined that Mr. Muggle was entitled to payment for a closed period from August 13, 2001 through March, 2002, and that the Respondent/Employer was responsible for 50% of the weekly benefits. A copy of that Decree is attached.
>
> "4. The Decision by the Trial Judge in connection with that matter was based upon the fact that the [sic] it appeared from the evidence that the claimant had initially contracted the bilateral carpal tunnel syndrome in earlier employment with an employer not within the state of Rhode Island. A copy of the Trial Decision is attached.
>
> "5. The Employer, through its insurance carrier, pursued a request for reimbursement from the workers' compensation administrator [sic] fund pursuant to the provisions of R.I.G.L. § 28-35-20(f). That request was denied by the Division of Workers' Compensation, and the matter was reviewed by the Director of the Department of Labor & Training."

It should be noted that the trial judge in W.C.C. No. 01-06627, Mr. Muggle's original petition, found that the bilateral carpal tunnel syndrome he developed was an occupational disease. In addition, the only issue in contention before the trial judge in that matter was whether the liability of the employer, Berkshire Construction Services, should be reduced pursuant to R.I.G.L. § 28-34-10.

The trial judge in the present matter, after reviewing the relevant statutes and case law, particularly the decision of the Rhode Island Supreme Court in Vater v. HB Group, 667 A.2d 283 (R.I. 1995), reversed the decision of the Department's hearing officer and ordered that the Workers' Compensation Administrative Fund (hereinafter "the Fund") reimburse Berkshire Construction Services (hereinafter "Berkshire") for fifty percent (50%) of the weekly benefits and medical expenses it had paid pursuant to the pretrial order issued in W.C.C. No. 01-06627. The Director of the Department (hereinafter "the Director"), as administrator of the Fund, filed the present claim of appeal.

Our review of the findings of fact made by a trial judge is limited by the standard set forth in R.I.G.L. § 28-35-28(b):

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

The appellate panel is precluded from substituting its own evaluation of the evidence for that of the trial judge without initially determining that the trial judge was clearly wrong or misconceived or overlooked material evidence. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98 (R.I. 1992).

The Director has filed three (3) reasons of appeal in which she argues that the trial judge erred in concluding that the employee, Robert Muggle, was not entitled to the benefits he received pursuant to the pretrial order because Berkshire was unable to pursue apportionment against his prior employer which was not subject to the jurisdiction of the Rhode Island Workers' Compensation Court. Consequently, the trial judge erroneously ordered the Fund to reimburse Berkshire for the benefits it paid in excess of its liability, which was only fifty percent (50%). Based upon the decision of the Rhode Island Supreme Court in Vater v. HB Group, 667 A.2d 283 (R.I. 1995), we are constrained to deny the appeal of the Director in this instance.

In Vater, the employee developed carpal tunnel syndrome, which was determined to be an occupational disease. The last employer was located in Rhode Island, but the employee's previous employers were all located in Massachusetts. The Court noted that the case involved the interpretation and application of two (2) provisions of the Workers' Compensation Act which address occupational diseases. Section 28-34-8 provides in pertinent part:

> "The total compensation due shall be recovered from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, the disease was contracted while the employee was in the employment of a prior employer, the employer who is made liable

> for the total compensation as provided by this section may petition the workers' compensation court for an apportionment of the compensation among the several employers who since the contraction of the disease have employed the employee in the employment to the nature of which the disease was due."

This section must be read in conjunction with R.I.G.L. § 28-34-10, which states as follows:

> "The employee . . . if so requested, shall furnish the last employer or the director of the workers' compensation court with any information as to the names and addresses of all of his or her other employers during the twenty-four (24) months that he or she or they possess . . . . if that information is not furnished or is not sufficient to enable the last employer to take proceedings against the other employers under § 28-34-8, the last employer shall be liable only for that part of the total compensation as under the particular circumstances of the workers' compensation court deem just; . . . ."

In Vater, the Rhode Island Supreme Court concluded that the trial judge properly exercised his discretion under R.I.G.L. § 28-34-10 in finding that the last employer was only liable for twenty-five percent (25%) of the total compensation benefits because it was unable to proceed against the employee's prior out-of-state employers to apportion the liability for the employee's claim. This decision resulted in the employee receiving only twenty-five percent (25%) of the benefits to which she would otherwise have been entitled if her previous employers were located in Rhode Island. Furthermore, the interpretation of § 28-34-10 enunciated in Vater implicitly vacated the Court's previous pronouncement in Leva v. Caron Granite Company, 84 R.I. 360, 124 A.2d 534 (1956), that the inability of the last employer to apportion liability to prior employers does not affect the employee's right to receive his full benefits from the last employer as provided in R.I.G.L. § 28-34-8. The Court implicitly affirmed its holding in Vater when it denied the petition for writ of certiorari in Lemos v. Casten Victor & Company, 704 A.2d 217 (R.I. 1997), which presented a similar factual scenario.

In the present matter, Berkshire sought reimbursement of fifty percent (50%) of the weekly benefits and medical expenses it paid pursuant to the pretrial order entered in this case. Section 28-35-20(f) of the Rhode Island General Laws provides for reimbursement from the Fund to an employer or insurer when a trial judge modifies or reverses the award of benefits initially made at a pretrial conference.

> "If after trial and the entry of a final decree, it is determined that the employee or medical services provider was not entitled to the relief sought in the petition, the employer or insurer shall be reimbursed from the workers' compensation administrative fund, described in chapter 37 of this title, to the extent of any payments made pursuant to the pretrial order to which there is no entitlement."

R.I.G.L. § 28-35-20(f).

The Director argues that the employee, Mr. Muggle was entitled to the full amount of workers' compensation benefits, although Berkshire may not have been liable for the total amount, and therefore reimbursement is not in order. Obviously, it was established that the employee had a valid workers' compensation claim. Admittedly, if his injury was not classified as an occupational disease or if all of his prior employers were located in Rhode Island, we would not be faced with this issue. However, contrary to the assertions of the Director, we believe that the Rhode Island Supreme Court did address § 28-34-10 in Vater and quite clearly stated that in a situation where the last employer cannot proceed against prior employers for apportionment of the liability for an employee's claim, the employee is only entitled to receive from the last employer that portion of the total compensation which the court deems just. Id. at 286-287. To adopt the Director's position in this situation would be in direct contradiction to the interpretation and application of § 28-35-10 set forth in Vater.

Consequently, we find no error on the part of the trial judge. The appeal of the Director is denied and dismissed and the trial judge's decision and decree ordering reimbursement from the Fund is affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Bertness and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Hardman, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on April 6, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Bernard P. Healy, Esq., and Ann Marie Paglia, Esq., on

_____